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No. 08-699

IN THE

Supreme Court of the United States

E.I. DUPONT DE NEMOURS & COMPANY,
Petitioner,

v.

AMPTHILL RAYON WORKERS, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an employer who has arguably breached provisions in its collective bargaining agreement by decreasing fringe benefits may escape the contractual arbitration procedure by having the dispute resolved through ERISA benefit claims procedures which, as a matter of law and by stipulation, are prohibited from addressing the breach of contract issues.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Respondent states that the parties to the proceeding in this Court are the same parties who appeared before the Fourth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Ampthill Rayon Workers, Incorporated, states that it is a Virginia not-for-profit corporation with membership limited to employees represented by the Union at DuPont's Spruance facility in Ampthill, Virginia.

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INTRODUCTION

This case does not present the question posited by DuPont. DuPont contends that the collective bargaining agreement ("CBA") contains "forceful evidence" that the Union's grievance alleging that DuPont violated the CBA by amending its benefit plans to reduce promised benefits must be resolved through the plans' "dispute resolution procedures for benefit eligibility" rather than through the CBA's arbitration procedure. [Pet. at (i)]. But DuPont has correctly stipulated that "the Plan Administrator cannot ignore Plan amendments because they are

inconsistent with the terms of a collective bargaining agreement." [Opp. App. 1a - 3a].[1]

Although the underlying grievance alleges that DuPont's amendments to four ERISA benefit plans violate the CBA, this case does not involve ERISA. ARWI has never contended that ERISA restricts DuPont's right to reduce plan benefits. Nor has ARWI ever challenged the interpretation or effect of the plan amendments at issue.

DuPont can amend its plans at will except where it has promised in a CBA that it would not do so. The only question presented in this dispute is whether, as the Union contends, the CBA contains DuPont's promise not to reduce plan benefits as it has done here.

ARWI contends, and the Fourth Circuit correctly held, that arbitration is the proper forum for resolving whether these plan amendments breach the Agreement.

The Petition asks the Court to review the Fourth Circuit's decision in a run of the mill case involving the scope of DuPont's contractual agreement to arbitrate grievances alleging a breach of contract. Solely because the grievance alleges a breach of an agreement not to reduce benefits, DuPont asks the Court to dislodge a cornerstone of the national labor policy embodied in the Taft-Hartley Act, 29 U.S.C. §§185 and 173(d): that federal courts should promote arbitration where that is the "Final adjustment ... method agreed upon by the parties." These provisions form the basis not only for the seminal

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[1] DuPont neglected to mention these stipulations in its Petition.

Steelworker Trilogy,[2] but also for its progeny, *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986).

DuPont's Petition raises several ERISA questions which are unnecessary for the resolution of this case. ERISA's dispute resolution procedures are uniquely inappropriate to resolve breach of contract issues. Yet DuPont candidly informs the Court that the issue of contractual interpretation must be resolved through the ERISA dispute resolution mechanism so that a court reviewing DuPont's decision will apply the "arbitrary and capricious" standard applicable when a plan fiduciary has discretion to interpret the terms of its plan and which has never been applied to a dispute over the interpretation of a collective bargaining agreement.

DuPont neglects to mention that three other district courts interpreting virtually identical contract language and the same employee benefit plans have also concluded that DuPont must arbitrate similar grievances filed by their unions because the grievances allege breaches of contract, not claims for benefits under plan language. As that unanimity reflects, this is a run of the mill arbitrability case that presents no question warranting review.

STATEMENT OF THE CASE

E.I. du Pont de Nemours and Company ("DuPont") and the Ampthill Rayon Workers, Inc. ("ARWI") are parties to collective bargaining agreements ("CBA") covering approximately 1,000 workers in two bar-

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[2] *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

gaining units at DuPont's Spruance Fibers Plant. The Agreement contains a grievance and arbitration procedure providing that "Any question as to the interpretation of this Agreement, or as to any alleged violation of the terms of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, shall at the request of either party be submitted to arbitration" and that "The award by the arbitrator shall be final and binding on both the UNION and the COMPANY." [Pet. App. 11a].

Article VII, entitled "Industrial Relations Plans and Practices," addresses the employee benefit plans made available to ARWI-represented employees. Article VII states, in pertinent part, as follows [Pet. App. 12a-13a]:

ARTICLE VII

Industrial Relations Plans and Practices

Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the Plant shall continue, subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant to govern such privileges; provided, however, that as long as one of these COMPANY Plans and Practices is in effect at any other Plant within the Company it shall not be withdrawn from the employees covered by this Agreement, and provided, further, that any change in these

> Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change.
>
> . . . . .
>
> Section 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY'S Beneflex Flexible Benefits Plan, subject to all terms and conditions of said Plan, provided, however, that as long as this Plan is in effect at any other Plant within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement.

DuPont's benefit plans provide that each Plan is administered by a "Plan Administrator" which is DuPont itself. "Claims Procedures," through which an employee whose "claim for benefits" has been denied by the Plan Administrator "may request a review by DuPont" are contained in the Summary Plan Descriptions ("SPDs") DuPont has issued. [Pet. App. 45a, 56a, 57a].

The SPDs do *not* provide that the Union may present a grievance through the Claims Procedures; nor do they provide for consideration of a contention that the terms of the plan are invalid because they do not conform to the requirements of a CBA. [Pet. App. 57a]. Rather, the parties have stipulated that the "eligibility determinations" made by the Plan Administrators and by DuPont's reviewing officials "must be made consistent with the terms of the [plans],

including any amendments," and that the Plan Administrators and reviewing officials "cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement." [Opp. App. 1a-3a (emphasis supplied)].

On August 28, 2006, DuPont announced several changes to certain employee benefit plans in which DuPont employees participate. On December 20, 2006, DuPont amended each of the benefit plans to impose the changes it had announced. "[S]everal of the amendments ... amounted to a significant reduction in employee benefits." [Pet. App. 14a-15a].

ARWI filed a grievance alleging that the plan amendments violated Article VII by amending the plans in ways not permitted by the Agreement. [Pet. App. 28a-30a]. After the parties processed the grievance through the contractual grievance procedure without reaching agreement, ARWI demanded arbitration. On January 23, 2007, the parties selected Arbitrator Ira Jaffe to resolve the dispute. DuPont then "reversed course" [Pet. App. 2a], announced that it would refuse to arbitrate any matters alleged in the ARWI grievance, and filed this action. [Pet. App. 15a-16a].

Based on a stipulated record, the District Court granted ARWI's Motion for Summary Judgment on September 24, 2007. Observing that in trying "to construe this grievance as a dispute over benefit eligibility, ... the company has mischaracterized ARWI's grievance" [Pet. App. 19a], the District Court recognized that "ARWI's grievance is quite simply that DuPont's 2006 amendments violated the parties' CBA and should be arbitrated." [Pet. App. 20a-21a] The District Court then concluded that the Union's grievance was arbitrable as to those benefit plans in

dispute and issued a Final Order compelling arbitration of the grievance as to those benefit plans. [Pet. App. 18a-27a].

Relying on this Court's decision in *AT&T Technologies, Inc. v. Communications Workers*, *supra*, 475 U.S. at 647, the Fourth Circuit affirmed. The Fourth Circuit concluded that the dispute comes within the scope of the arbitration clause; that no other provision of the contract expressly excludes this kind of dispute from arbitration; and that no other "forceful evidence" indicates that the parties intended such an exclusion. [Pet. App. 8a-9a].

The Fourth Circuit recognized "that the result of the plans' amendments will decrease the benefits available to certain DuPont employees" [Pet. App. 8a-9a] and that the validity of the amendments will "affect an employee's eligibility to receive benefits under the plans." [Pet. App. 9a]. But the Court explained that this does not serve to make the Union's grievance subject to DuPont's internal claims procedures rather than to arbitration, because "ARWI's breach of contract claims are premised on the fact that [the] *changes* [made to the terms of the plans by the plan amendments] *violate the terms of the CBAs*." [Pet. App. 9a (emphasis in original)].

Steelworker unions representing employees at DuPont facilities in Delaware, New Jersey and New York also filed grievances challenging DuPont's amendments to the benefit plans, under contract language similar to the language of the ARWI Agreement. DuPont refused to arbitrate those grievances, and the District Courts for the District of Delaware, the District of New Jersey and the Western District of New York have all granted judgment to the Steelworkers requiring DuPont to

arbitrate the grievances, on reasoning consistent with that of the courts below.[3] Those decisions have been appealed by DuPont to the Second and Third Circuits.

REASONS FOR DENYING THE PETITION

All of DuPont's arguments are built on a false premise, because the dispute presented by ARWI's grievance is *not* one that could be resolved through DuPont's internal plan claims procedures. Once that is recognized, it is apparent that the decision below is not in conflict with any decision of this Court or of any Court of Appeals, and that there is no foundation for DuPont's arguments that the decision creates a lack of "harmony" with ERISA

I. THE FOURTH CIRCUIT DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

DuPont's Petition challenges the Fourth Circuit's application of *AT&T Technologies, Inc. v. Communications Workers*. [Pet. App. 4a-6a]. Arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Warrior & Gulf*, 363 U.S. at 582. Federal courts must determine whether a collective bargaining agreement creates a duty to arbitrate a

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[3] *Steelworkers v. E. I. DuPont de Nemours & Co.*, 549 F. Supp. 2d 585 (D. Del. 2008), appeal docket No. 08-2510-cv; *Steelworkers Local 943 v. E. I. DuPont de Nemours & Co.*, Nos. 07-0965 (RBK), 2008 U.S. Dist. LEXIS 15628 (D.N.J. 2008. 29, 2008), appeal docket No. 08-1873-cv [A. 4a-18a]; *Steelworkers Local 4-786 v. E.I. DuPont de Nemours & Co.*, No. 1:07-cv-00122, 2008 U.S. Dist. LEXIS 21319 (W.D.N.Y. March 18, 2008), appeal docket No. 08-1873-cv [A. 19a-34a].

particular grievance. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. at 649. In making that determination, however, there is a presumption of arbitrability. *Id.* at 650, quoting *Warrior & Gulf, supra*, 363 U.S. at 582-583. Where, as here, the arbitration provision is a broad one, "[i]n the absence of an express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 650, quoting *Warrior & Gulf, supra*, 363 U.S. at 584-585.

Dupont asserts that the Fourth Circuit misapplied the "forceful evidence" exception to the presumption [Petition at 8], thereby conceding that the Fourth Circuit accurately concluded that the arbitration clause is "broad" and that there is no express exclusion of this type of grievance. [Petition App. 8a].

In considering and rejecting DuPont's argument that the "subject to" language in Article VII constituted "forceful evidence" that the parties had agreed not to arbitrate disputes of this kind, the Fourth Circuit noted "the fact that the parties chose to explicitly exclude arbitration as a forum for resolving certain types of disputes ..., the CBAs preclude a [probationary] employee disputing his discharge ... or the denial of a promotion from proceeding to arbitration."[4] The Fourth Circuit also noted that DuPont initially recognized that the grievance was subject to arbitration and agreed upon an arbitrator, only later to renege and sue to enjoin the arbitration. [Petition A. 8a]. The Fourth Circuit concluded that "DuPont

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[4] "[C]ontracts that specify certain exceptions imply that there are no other exceptions." Elkouri & Elkouri, HOW ARBITRATION WORKS 468 (6th Ed. 2003).

has not provided "forceful evidence," much less "the most forceful evidence," that the parties" intended to submit an employee's claims alleging violations of the CBAs to the plan administrator or to a federal court." [Petition A. 9a].

This case was presented to the District Court on a stipulated record which contains no bargaining history for the provision in Article VII obligating DuPont to "continue [the ERISA plans], subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant ...." There is no evidence that the parties meant the "subject to" clause to exclude from arbitration allegations that otherwise lawful "modifications" breached provisions in the CBA.

There are, however, stipulations that the parties understood that DuPont's plan administrators could *not* in the claims procedures address the breach of contract allegations posed by the Union's grievance. [Opp. App. 1a-3a]. These stipulations are "forceful evidence" that the negotiators did *not* intend to exclude such disputes from arbitration.

The situation presented here – a benefit plan claims procedure that does not confer on the administrators the authority to entertain a union's grievance alleging that a plan amendment violates a CBA – has never been found by any court to constitute "forceful evidence" of an intention by the parties to exclude such a grievance from arbitration.

Contrary to DuPont's contention [Petition at 8-12], the Fourth Circuit's decision and analysis does not

present a conflict with decisions of other circuits. All of the cases upon which DuPont relies involve grievances held to be non-arbitrable because they alleged that a participant's claim for benefits had merit under the terms of the plan which the plan administrators had authority to construe; in none of those cases was it alleged that provisions found *solely in the CBA* were the source of the right being claimed.

Thus in *Machinists District 10 v. Waukesha Engine Division*, 17 F.3d 196, 198 and n.1 (7th Cir. 1994), the Seventh Circuit denied arbitration where there was no allegation that benefit changes violated a contract and expressly distinguished, and preserved, *Briggs & Stratton*, where a change in plan terms raised an arbitrable grievance because it alleged a breach of contract.[5] Equally without merit is DuPont's reliance on *Steelworkers v. Commonwealth Aluminum Corp,*. 162 F.3d 447, 451-452 (6th Cir. 1998), where the union made no contention "that the negotiated level of benefits were not properly set out in the Plan booklets." Significantly, the court found that a particular benefit plan evinced "an intention to exclude from arbitration all benefit disputes *which are within the Administrator's authority.*" *Id.* at 451 (emphasis supplied). Finally, in *Oil, Chemical and Atomic Workers, Local 4-449 v. Amoco Chemical Corp.*, 589 F.2d 162 (5th Cir. 1979), the court refused to compel arbitration of grievances where the union did not

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[5] In *Local 232, Allied Industrial Workers v. Briggs & Stratton Corp.*, 837 F.2d 782, 783 (7th Cir. 1988), the Seventh Circuit directed an employer to arbitrate where a grievance "alleged that certain unilateral changes the company made to [its retirement plan] violated the parties' collective bargaining agreement."

allege that the contested plan provisions violated the collective bargaining agreement.

The instant case is similarly distinguishable from *Printing Specialties, Local 680 v. Nabisco Brands, Inc.*, 833 F.2d 102, 105 (7th Cir. 1987), where the court stated that a "passing reference to the Pension Plan in the collective bargaining agreement does not bring specific pension disputes ... under the umbrella of the arbitration clause of the agreement." But the court noted that "[h]ad Nabisco failed to fulfill an obligation under the collective bargaining agreement which abrogated the full force and effect of the Pension Plan ... the result would have been different." *Id.* at 105. Similarly distinguishable is *Crown Cork & Seal Co. v. Machinists*, 501 F.3d 912, 918 (8th Cir. 2007), where the court found that the union could not point to any contract provision that had been violated and reversed an order to arbitrate.

As did the Fourth Circuit, a number other circuits have also required arbitration of grievances alleging that unilateral changes to employee benefit plans breached contracts. *Excelon Generation Co. v. Electrical Workers Local 15 (IBEW)*, 540 F.3d 604 (7th Cir. 2008); *Steelworkers Local 164 v. Titan Tire Corp.*, 204 F.3d 858, 861 (8th Cir. 2000); *Schweizer Aircraft Corp. v. Auto Workers Local 1752*, 29 F.3d 83, 86 (2nd Cir. 1994); *Air Line Pilots Ass'n v. Delta Air Lines, Inc.*, 863 F.2d 87, 93-94 (D.C. Cir. 1988); *RCA Corp. v. Professional and Technical Engineers Local 241*, 700 F.2d 921 (3rd Cir. 1983).

DuPont's assertion that arbitration would be inconsistent with "the reality that employee benefit plans are offered at the discretion of an employer" [Pet. at 16] overlooks that it is both common and entirely lawful for an employer to enter into a CBA that

requires the employer to provide certain benefits to the employees covered by the CBA. The extent to which Article VII of the CBA prohibits DuPont from terminating or changing its benefit plans "at [its] discretion" is precisely the question that Arbitrator Jaffe is called upon to decide in this case.[6]

In sum, there is no disagreement whatsoever among the Circuits with respect to the question presented by this case.[7]

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[6] Thus, for example, the arbitrator will be required to construe the language in Article VII, Section 1 which states that "[a]ll existing privileges heretofore enjoyed by the employees in accordance with the [specified benefit plans] shall continue, subject to the provisions of such Plans ... and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant to govern such privileges ...." [Pet. App. 12a-13a.] DuPont apparently intends to argue to the arbitrator that the quoted language gives the Company the right to make "modifications" in the substantive provisions of the Plans, whereas ARWI reads the language as allowing modifications only of "rules, regulations and interpretations," and as requiring that the substantive benefits "heretofore enjoyed by the employees ... shall continue". A dispute of this kind is "grist in the mills of the arbitrators." *Warrior & Gulf*, 363 U.S. at 584.

[7] DuPont's complaint that the court below "failed to consider the substantive provisions of the parties' CBA" [Pet. at 12] also misses the mark. DuPont's contention is that the court did not say enough about the provision in the CBA which states that benefits are to be provided "subject to" the plans' rules and regulations – including, in DuPont's view, the claims procedures in the SPDs. [*See* Pet. at 8-9]. But the Fourth Circuit discussed that provision at length [Pet. App. 6a-7a] and rejected DuPont's argument because it is "unfathomable that either of the parties could assume that the 'subject to' language in Article VII would override the overarching arbitration clause in Article XI of the CBAs," where the Union's grievance was not based on terms of

II. THIS CASE PRESENTS NO ISSUE REGARDING THE RELATIONSHIP BETWEEN ERISA AND THE NATIONAL POLICY FAVORING ARBITRATION

Ignoring the Fourth Circuit's conclusion that ARWI's grievance presents a classic breach of contract allegation, DuPont discusses ERISA issues which are not presented in this case.

A. ERISA Does Not Require That Grievances Alleging a Breach of Contract Be Resolved Through Plan Claims Procedures

This case presents no need for an accommodation or "harmonization" between ERISA and Section 301. [Pet. at 21-23]. ERISA does not preempt the Taft-Hartley Act provisions favoring arbitration. 29 U.S.C. §1144(d). Because this case does not involve the processing of a benefit claim, the Fourth Circuit's decision does not jeopardize the "exclusive" ERISA civil enforcement scheme as did the state laws held pre-empted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

As DuPont has repeatedly stipulated, the DuPont plan claims procedure does not allow the plan administrator to consider allegations that plan amendments breach the collective bargaining agreement. [Opp. App. 1a - 3a]. These stipulations correctly reflect both ERISA and Department of Labor Regulations. *See* ERISA Section 503(2), 29 U.S.C. §1133(2); ERISA Section 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B);

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the plan but on a claim that DuPont had made "changes" in those plan terms that "*violate the terms of the CBAs*." [Pet. App. 8a-9a (emphasis supplied)].

ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3). Participants and beneficiaries can use a plan's internal procedures to challenge benefit decisions where they contend that the decision maker has failed to provide benefits required by the plan. The types of issues presented and the requirements of the appeals processes are illustrated by Department of Labor Regulations. 65 Fed. Reg. 70246 (November 21, 2000); 29 C.F.R. §2560.503. The Department explained that 29 C.F.R. §2560.503-1(b)(5) "provides, as a general requirement for reasonable claims procedures for all plans, that a plan's claims procedures must include administrative safeguards and processes designed to ensure and to verify that benefit claims determinations are made *in accordance with governing plan documents* ...." 65 Fed. Reg. at 70251 (emphasis supplied).

Each of the five courts which has addressed the grievances challenging DuPont's amendments to its benefit plans has concluded that these grievance do not present a benefit claim which can be resolved through the claims procedures required by ERISA and the Department of Labor Regulations. Without challenging those findings directly, DuPont nevertheless persists in asking the Court to declare that all disputes regarding eligibility for certain benefits contained in DuPont's ERISA plans are to be resolved exclusively through the procedures set forth in those plans. ARWI has never denied that benefit claims based on disputes over the meaning or application of plan language must be resolved through the ERISA claims procedure. But Congress has not mandated that grievances alleging that plan amendments breach a collective bargaining agreement must be resolved through plan claims procedures. To the contrary, Congress and this Court have established

that arbitration is the forum for addressing allegations that plan amendments breach a collective bargaining agreement.

B. ARWI's Grievance Does Not Challenge DuPont's Actions as an ERISA Fiduciary

DuPont's contention that this Court's decisions confer on employers a right to have the unilateral adoption of a Plan amendment "reviewed under [a] deferential abuse of discretion standard" [Pet. at 15, 19-20] is simply wrong. *See Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). *Metropolitan Life* and *Firestone* define the review that is called for "by principles of trust law" where "[a] trustee [has been] given power to construe disputed or doubtful terms" in "the instrument under which [he] act[s]." *Firestone*, 489 U.S. at 111. *See also Metropolitan Life*, 128 S. Ct. at 2347-48.

These cases do not suggest that deferential review is warranted of a plan sponsor's decision to change the terms of a plan in a way that is alleged to breach a CBA. "[P]lan sponsors who alter the terms of a[n ERISA] plan do not fall into the category of fiduciaries," *Lockheed Corp. v. Spinks*, 517 U.S. 882, 890 (1996), and DuPont "admitted at oral argument that it was acting in its capacity as plan settler when it amended the plans, not in its fiduciary role as plan administrator." [Pet. App. 20a]. ARWI's grievance thus does not challenge any exercise of fiduciary authority, and certainly not a trustee's interpretation of an instrument he has been "given power to construe." *Firestone*, 489 U.S. at 111.

C. ERISA's Arbitration Provisions Are Irrelevant

Because DuPont did not act in its fiduciary status when amending its plans, the arbitrator selected to determine whether the amendments violate the CBA does not become a plan fiduciary. DuPont's contention in that reghard [Petition at 18-19] has been rejected by the Department of Labor.

Arbitrator Jaffe's status would be most analogous to that addressed in Department of Labor Opinion Letter 81-50A (June 4, 1981). Confronting a grievance alleging a conflict between a collectively bargained agreement and a pension plan provision both governing benefit accrual, the Department concluded as follows:

> ... It appears that the arbitrator has been called upon to construe two documents which comprise, at least in part, the collectively bargained agreements between the Union and the Employer, but that the outcome of the arbitration would have no immediate effect on administration of the plan or on the rights of Plan participants to benefits under the Plan as it is currently drafted. Although the outcome of the proceeding might increase the entitlement of some Plan participants to benefits, it appears that the arbitrator's decision would not affect the long-standing interpretation given to existing Plan provisions. ... a participant's entitlement to benefits under the Plan would be affected only if the Employer were to amend the Plan to achieve compliance with a ruling by the arbitrator.
>
> Based on your representations, it is our understanding that the instant proceeding resembles

> *an extension of the process of collective bargaining* between the Union and the Employer. [Emphasis supplied].

Because there is no dispute concerning the meaning or effect of the 2006 plan amendments or concerning the meaning or effect of the plans, the ARWI-represented employees' "entitlement to benefits under the Plan[s] would be affected only if the Employer were to amend the Plan to achieve compliance with a ruling by the arbitrator" that the amendments violate the collective bargaining agreements. Such arbitration is "an extension" of the collective bargaining process, not the administration of an ERISA plan.

Equally without merit is DuPont's contention that it would breach its fiduciary duty by allowing an arbitrator to resolve the contractual dispute. As in *RCA Corp.* and Opinion Letter 81-50A, Arbitrator Jaffe could not determine the level of plan benefits. But he has jurisdiction to create a "make whole" remedy.

D. The Arbitration Would Not Involve Statutory Rights

Unlike *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), Arbitrator Jaffe will be asked to resolve a purely contractual issue: whether Article VII prohibited DuPont's 2006 plan amendments as applied to the bargaining units ARWI represents. He will not be asked to interpret ERISA or any other federal or state law. DuPont's reference to this Court's forthcoming decision in *14 Penn Plaza v. Pyett*, No. 07-582, *cert. granted*, 128 S. Ct. 1223 (February 19, 2008), is, therefore, misleading.

Penn Plaza presents the question whether an employee's right to pursue in court a statutory dis-

crimination claim as to which the employee's interest may conflict with that of the union is forfeited by the union's decision not to present the discrimination claim in arbitration. This case involves no issue of such a nature. ARWI's grievance only calls upon Arbitrator Jaffee to determine the Union's rights under the CBA

CONCLUSION

The Petition a Writ of Certiorari should be denied.

Respectfully submitted,

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December 24, 2008

APPENDIX

APPENDIX A

Stipulation Excerpts (emphasis supplied)

11. Benefit determinations, including eligibility determinations, are made by the Plan Administrator, acting as an ERISA fiduciary with respect to such eligibility determinations and in the exercise of its discretion as the only person designated under the SIP to make final determinations and interpretations. The Plan Administrator's eligibility determinations must be made consistent with the terms of the SIP, including any amendments; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement.

17. Article II of the Pension Plan Document provides that the plan is administered by a "Board of Benefits and Pensions," the members of which are appointed by DuPont. Article II addresses the rights and authority of the Board of Benefits and Pensions as Plan Administrator. The Pension Plan SPD describes an employee's right to appeal any denial of a claim for benefits under the Pension Plan and specifies that employees whose claims are denied in whole or in part may file suit in a state or federal court to vindicate their rights. The Board of Benefits and Pensions' eligibility determinations must be made consistent with the terms of the Pension Plan, including any amendments; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement. Included among claims that are subject to the claims procedure set forth in the SPD are individual eligibility determinations made by the Board of Benefits and Pensions. In some cases, claims related to eligibility determinations may be

asserted in a civil action pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B).

22. Consistent with ERISA requirements, the Life Insurance Plan SPD describes an employee's right to appeal any denial of a claim for benefits under the Life Insurance Plan and specifies that employees whose claims are denied in whole or in part may file suit in a state or federal court to vindicate their rights. Included among claims that are subject to the claims procedure set forth in the summary plan description are individual eligibility determinations made by the Plan Administrator. The Plan Administrator's eligibility determinations must be made consistent with the terms of the Life Insurance Plan, including any amendments; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement. In some cases, claims related to eligibility determinations may be asserted in a civil action pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B).

39. Consistent with ERISA requirements, the SPD pertaining to the Beneflex Vacation Buying Plan describes an employee's right to appeal any denial of a claim for benefits under the Beneflex Vacation Buying Plan and specifies that employees whose claims are denied in whole or in part may file suit in a state or federal court to vindicate their rights. The Plan Administrator's eligibility determinations must be made consistent with the terms of the BeneFlex Vacation Buying Plan, including any amendment; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement. Included among claims that are subject to the claims procedure set

forth in the BeneFlex Vacation Buying Plan are individual eligibility determinations made by the Plan Administrator. In some cases, claims related to eligibility determinations may be asserted in a civil action pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No. 07-0965 (RBK),
Civil No. 07-1005 (RBK)

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL UNION 943,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
Defendant.

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL UNION 943,
Plaintiff,

v.

DUPONT PERFORMANCE ELASTOMERS, L.L.C.,
Defendant.

February 29, 2008, Decided
February 29, 2008, Filed

JUDGES: ROBERT B. KUGLER, *United States District Judge.*

OPINION BY: ROBERT B. KUGLER

OPINION

KUGLER, *United States District Judge:*

Before the Court is a motion by Plaintiff United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied-Industrial and Service Workers Local Union 943 ("Local 943") for judgment on the pleadings or in the alternative, for summary judgment, compelling Defendants E.I. du Pont de Nemours and Company ("DuPont") and DuPont Performance Elastomers, LLC ("DPE") (collectively "Defendants") to arbitrate certain grievances. Further before the Court is Defendants' cross-motion for summary judgment on Local 943's complaints seeking to compel arbitration. Also before the Court are Local 943's motion to strike a portion of the Declaration of Mary Jo Anderson and motion for leave to file supplemental authority. Local 943's grievances challenge amendments Defendants made to some of their employee benefits plans. For the reasons set forth below, the Court will construe Local 943's motion as a cross-motion for summary judgment, which the Court will grant; the Court will deny Defendants' cross-motion for summary judgment. Moreover, the Court will deny Local 943's motion to strike and grant its motion for leave to file supplemental authority.

I. BACKGROUND

A. Collective Bargaining Agreements

This case involves three collective bargaining agreements ("CBAs"). Two of these CBAs are between DuPont and Local 943 and cover certain employees at DuPont's Deepwater, New Jersey plant ("DuPont CBAs"), and the third is between DuPont affiliate DPE and certain employees of DPE's plant in Deepwater. (DuPont Am. Compl. & Answer PP 5, 7.)

Each of these CBAs contain an identical arbitration clause, which states in relevant part, "A grievance relating to the interpretation or to any alleged violation of this Agreement not settled to the mutual satisfaction of either party by . . . the grievance procedure may be submitted to arbitration on written request of either party." (DuPont Am. Compl. Exs. A, B, Art. XI; DPE Compl. Ex. A, Art. X.)

The amendments to which Local 943 objects affected two articles of the CBAs entitled "Industrial Relations Plans and Practices" ("IRP&P provision"), present in both the DuPont and DPE CBAs, and "Hospital and Medical-Surgical Coverage," exclusive to the DuPont CBAs. The IRP&P provision states in part:

> All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the PLANT shall continue, subject to such rules, regulations, and interpretations as existed prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the COMPANY or by the PLANT to govern such privileges; provided, however, that as long as any one of these COMPANY Plans and Practices is in effect at any other PLANT within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement[.]

(DuPont Am. Compl. Exs. A, B, Art. VII; DPE Compl. Ex. A, Art. VII.) The IRP&P provisions are followed by a list of plans and practices to which the provision applies. In the DuPont CBAs, the list includes three plans to which Defendants made changes: the Pension and Retirement Plan ("Pension Plan"), Savings

and Investment Plan ("SIP"), and Dental Assistance Plan ("Dental Plan"). (Defs.' Stmt. of Facts P 14.) The DPE CBA lists two affected plans, the Pension Plan and SIP. (*Id.* P 19; DPE Compl. Ex. A, Art. VII.)

The DPE CBA also contains an additional section in its Article VII not present in the DuPont CBAs. This "Section 3" requires DPE to provide "benefits as provided by the Company's Beneflex Benefits Plans, subject to all terms and conditions of said Plan." (DPE Am. Compl. Ex. A, Art. VII § 3.) The Beneflex Benefits Plans signify the Beneflex Life Insurance Plan ("Life Insurance Plan") and Beneflex Vacation Buying Plan ("Vacation Plan"). (Defs.' Stmt. of Facts P 20.)

The other Article relevant to the parties' dispute is the "Hospital and Medical-Surgical Coverage" provision at Article XVI, which only appears in the DuPont CBAs. This provision requires DuPont to provide medical coverage through the Medical Care Assistance Program ("MEDCAP"). (Stip. P 15; DuPont Am. Comp. Ex. A, Art. XVI §§ 1-4.) Alternatively, the provision permits DuPont to make premium payments for alternate coverage to an approved Health Maintenance Organization. (*Id.*)

B. Announced Plan Amendments and Resulting Grievances

On August 28, 2006, DuPont sent an email to all U.S. employees announcing changes to its employee benefits offerings. (DuPont Am. Compl. & Answer P 10; DPE Compl. & Answer P 9.) These amendments included several changes affecting new employees hired on or after January 1, 2007: DuPont eliminated their eligibility for the Pension Plan, SIP, MEDCAP, Dental Plan, and Life Insurance Plan and reduced their available benefits under the Vacation Plan.

(Defs.' Stmt. of Facts PP 42, 45-49; DuPont Am. Compl. Ex. C.) The amendments also affected plans of then-existing employees, including modifications to the Pension Plan and SIP. (Defs.' Stmt. of Facts PP 43, 45; DuPont Am. Compl. Ex. C.)

On September 22, 2006, Local 943 filed grievances with DuPont and DPE alleging that the changes violated several provisions of the CBAs. (DuPont Am. Compl. Ex. D; DPE Compl. Ex. C.) Regarding active employees, Local 943 alleged that the changes to the Pension Plan and SIP violated the IRP&P provision of the CBAs because "such changes are not permitted 'modifications' within the meaning of that article and section." (DuPont Am. Compl. Ex. D; DPE Compl. Ex. C.) Local 943 cited the same reasoning for why the changes applicable to new hires contravened the CBAs. (*Id.*) In addition, Local 943 alleged that the changes affecting new hires involved "Company Plans and Practices" within the meaning of the IRP&P provision and that their withdrawal from certain employees covered by the CBA violated that provision since the "Plans and Practices" remained "in effect within the Company." (*Id.*)

Finally, Local 943 had two grievances specific to each CBA. The DuPont grievance claimed that the elimination of MEDCAP for new hires violated the Hospital and Medical-Surgical Coverage provision of the DuPont CBAs. (DuPont Am. Compl. Ex. D.) The DPE grievance alleged that the elimination of the Life Insurance Plan and reduction in benefits under the Vacation Plan for new hires violated the IRP&P provision of the DPE CBA. (DPE Compl. Exs. C, D.)[1]

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[1] The original grievance filed against DPE mistakenly cited Article VIII, Section 1 of the DPE CBA. Local 943 corrected this

In a written response dated January 25, 2007, DuPont asserted that it was not contractually obligated to submit the grievances to arbitration. (DuPont Am. Compl. Ex. E.) It indicated that it considered the grievances to raise disputes regarding the eligibility of Local 943 members for benefits under the plans. (*Id.*) DuPont and DPE stated further that such disputes must be resolved using the claim procedures set forth in the summary plan descriptions of each plan or, once administrative remedies are exhausted, through a civil enforcement action under Section 502 of ERISA. (*Id.*) DPE sent a similar letter on February 27, 2007 to Local 943 concerning the DPE grievances. (DPE Compl. Ex. F.)

C. Resulting Litigation

Local 943 filed suit against DuPont on February 28, 2007 and against DPE two days later, seeking to compel Defendants to submit Local 943's grievances to arbitration pursuant to the arbitration clause in the CBAs. On July 18, 2007, the two cases were consolidated. Five days later, Local 943 filed a motion for judgment on the pleadings or in the alternative, a cross-motion for summary judgment, and Defendants filed a cross-motion for summary judgment based on a stipulated record. Since then, each party filed responses and replies. In addition, Local 943 filed a motion to strike a portion of Mary Jo Anderson's Declaration, which Defendants opposed, as well as a motion for leave to file supplemental authority, attaching a decision in a related case in the Eastern District of Virginia, which Defendants did not oppose.

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error in an amended grievance dated March 2, 2007, which refers to Article VII, Section 3.

DuPont and its affiliates have fielded additional grievances stemming from the same announced benefit plan changes and has refused to arbitrate any of them based on the same reasoning it offered Local 943 in this case. (Knight Decl. Exs. A-G.) Consequently, unions have brought several actions against DuPont seeking to compel arbitration. *See United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union, AFL-CIO-CLC, et al. v. E.I. DuPont de Nemours & Co.*, Civ. A. No. 07-126 (D. Del.); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 4-5025 v. E.I. DuPont de Nemours & Co.*, Civ. A. No. 07-122 (W.D.N.Y.); *E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, Civ. A. No. 07-52 (E.D. Va.). The parties have filed cross-motions for summary judgment based on a stipulated record in each of these jurisdictions. Only the Eastern District of Virginia has decided the motions, *see E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, 516 F. Supp. 2d 588 (E.D. Va. 2007), a decision which DuPont has appealed.

This Court will construe the parties' motions as cross-motions for summary judgment, as it relies on Defendants' statement of material facts, which incorporates sources outside the pleadings. Furthermore, given the stipulated record, the Court discerns no issues of material fact.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S. Ct.

2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could find for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When the Court weighs the evidence presented by the parties, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

When parties file cross-motions for summary judgment, the court must apply the summary judgment standard to each party's motion individually. *See Appelmans v. City of Phila.*, 826 F.2d 214, 216 (3d Cir. 1987). Where review of cross-motions for summary judgment reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts. *See Iberia Foods Corp. v. Romeo Jr.*, 150 F.3d 298, 302 (3d Cir. 1998) (citing *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 145-46 (3d Cir. 1988)).

III. DISCUSSION

A. Parties' Arguments

Defendants argue that Local 943's grievances are not within the scope of the arbitration clause in the CBAs. (Defs.' Br. at 16-17.) Defendants argue further that plans not mentioned in the respective CBAs cannot be subject to the arbitration clauses. As for the plans that are referenced in the CBAs, Defendants contend that the grievances implicate eligibility issues, which are not subject to arbitration but instead, pursuant to ERISA, must be handled in the dispute resolution process outlined in the plan documents. Local 943 counters that its grievances do

not question the application of the benefits plans but rather whether the CBAs afford Defendants the power to make the changes to the plans.

B. Grievances Do Not Involve Benefits Eligibility Determinations

Defendants' characterization of Local 943's grievances as involving benefits eligibility determinations is unpersuasive. The Court is instead persuaded by the reasoning of the Eastern District of Virginia in addressing DuPont's identical argument in the suit pending before it. There, the court distinguished the cases cited by DuPont as involving "typical benefit eligibility determinations by plan administrators such as determining whether medical necessity exists for a given procedure or requiring a referral before certain diagnostic tests will be reimbursed." *Ampthill Rayon Workers, Inc.*, 516 F. Supp. 2d at 594. The court continued, "The amendments made to benefit plans by DuPont at issue here are of a wholly different nature than routine benefit eligibility determinations. . . . DuPont has not administered the plans, they have altered them." *Id.* While Defendants' plan amendments presumably could ultimately impact the eligibility of individual employees, the grievances initiated by Local 943 relate instead to whether DuPont's modifications violate the specific terms in the DuPont and DPE CBAs.

C. Plans Referenced in the CBAs Are Subject to the Arbitration Clause

With the nature of the grievances clarified, the Court must next determine whether they are subject to the arbitration clause. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to

submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). The presence of an arbitration clause in an agreement creates a presumption in favor of arbitration. *Id.* at 650. In the case of a broadly worded arbitration clause, the presumption is even stronger. *Id.* When an agreement's arbitration clause is broad, absent "any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584-585, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). Additionally, in evaluating the question of arbitrability, the court must not extend its analysis to the merits of the underlying claim. *Id.* at 649.

Here, the arbitration clause contained in the DuPont and DPE CBAs is broadly worded, thus triggering the strong presumption in favor of arbitration. The clause commits to arbitration any grievance "relating to the interpretation or to any alleged violation of this Agreement," which is not settled via the grievance procedure. (DuPont Am. Compl. Ex. A, Art. XI; DPE Compl. Ex. A, Art. X.) The Third Circuit has characterized as "broad" a similar arbitration clause referring to "any dispute arising out of a claimed violation of this Agreement." *See E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 812 F.2d 91, 92, 95 (3d Cir. 1987); *see also AT&T Techs., Inc.*, 475 U.S. at 650 (finding arbitration clause regarding "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" to be broad). Thus, in order to overcome this presumption of arbitrability, Defendants must show either (1) that

the CBAs expressly exclude the disputes from arbitration or (2) the existence of "strong and forceful" evidence of an intention to exclude them from arbitration. *See United Steelworkers of Am., AFL-CIO-CLC v. Lukens Steel Co., Div. of Lukens, Inc.*, 969 F.2d 1468, 1475 (3d Cir. 1992).

DuPont can show neither of the requirements to overcome the presumption. The arbitration clause plainly covers the grievances at issue because they relate to alleged violations and interpretation of specific articles of the CBAs. Specifically, Local 943's grievances encompass seven issues:

> (1) whether changes to the Pension Plan and SIP affecting existing employees violate Article VII, Section 1 of the DuPont and DPE CBAs because such changes are impermissible "modifications";
>
> (2) whether changes to the Pension Plan, SIP, and Dental Plan affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DuPont CBAs because such changes are impermissible "modifications";
>
> (3) whether changes to the Pension Plan and SIP affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DPE CBA because such changes are impermissible "modifications";
>
> (4) whether changes to the Pension Plan, SIP, and Dental Plan affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DuPont CBAs because the changes constitute the withdrawal of "Company Plans and Practices" that remain "in effect within the Company";

(5) whether changes to the Pension Plan and SIP affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DPE CBA because the changes constitute the withdrawal of "Company Plans and Practices" that remain "in effect within the Company";

(6) whether elimination of MEDCAP for new hires as of January 1, 2007 violates Article XVI of the DuPont CBAs; and

(7) whether elimination of the Life Insurance Plan and the Vacation Plan violates Article VII, Section 3 of the DPE CBA.

Thus, the grievances involve alleged violations of Article VII, Section 1 of both CBAs, Article XVI of the DuPont CBAs, and Article VII, Section 3 of the DPE CBA, thereby necessitating interpretation of those provisions. As such, each grievance falls within the scope of the broad arbitration clause because each relates to the interpretation or to an alleged violation of the respective CBAs. Moreover, neither the DuPont nor the DPE CBA includes an express limitation that could be read to exclude the grievances made by Local 943 from the scope of the arbitration clause. Finally, Defendants have not pointed to any evidence, much less strong and forceful evidence, of an intention to exclude the benefits plans from the applicability of the arbitration clause. Therefore, the grievances are subject to arbitration pursuant to the respective CBAs.

D. Motions to Strike and For Leave to File Supplemental Authority

Local 943 filed a motion to strike a portion of the Declaration of Mary Jo Anderson, which Defendants submitted in support of their cross-motion for sum-

mary judgment. Local 943 argues that paragraph 32 is not relevant to the inquiry before the Court because it impermissibly attempts to argue the meaning of the IRP&P provisions of the CBAs and otherwise violates the Federal Rules of evidence. Defendants oppose the motion, stating that their cross-motion for summary judgment does not seek a ruling on the merits and, in any case, paragraph 32 contains admissible statements of fact made on personal knowledge. Based on the Court's disposition of the parties' cross-motions for summary judgment, which did not reference the challenged declaration, it will deny Local 943's motion to strike.

In addition, Local 943 filed a motion for leave to file supplemental authority and attached the decision of the Eastern District of Virginia in the case brought by another union against DuPont seeking arbitration of similar grievances arising from the plan changes. Defendants did not oppose this motion; thus, the Court will grant it.

IV. CONCLUSION

Based on the foregoing reasoning, the Court will grant Local 943's cross-motion for summary judgment and deny DuPont and DPE's cross-motion for summary judgment. Furthermore, the Court will deny Local 943's motion to strike and grant it motion for leave to file supplemental authority. An accompanying order shall issue today.

Dated: 2/29/08

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

07-CV-122S

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL UNION 4-5025,
Plaintiff,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
Defendant.

March 17, 2008, Decided
March 18, 2008, Filed

JUDGES: WILLIAM M. SKRETNY, *United States District Judge.*

OPINION BY: WILLIAM M. SKRETNY

OPINION

DECISION AND ORDER

I. INTRODUCTION

This case involves a labor dispute between the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 4-5025 ("the Union") and E.I. DuPont DeNemours & Company ("DuPont") over a Grievance filed by the Union. The issue presently before this Court is whether the Grievance is subject to arbitra-

tion under the Collective Bargaining Agreement ("CBA"). Both Parties have filed cross-motions on this issue, which are resolved in this Decision and Order. For the following reasons, this Court finds that the Grievance should be submitted to arbitration.

II. BACKGROUND

A. Facts

DuPont, the Defendant, operates a manufacturing facility in Niagara Falls, NY. (DuPont's Memorandum of Law in Support of Summary Judgment, ("DuPont Mem."), Docket No. 32, pp. 8-9). The Union, the Plaintiff in this case, is the collective bargaining representative for the 165 production and maintenance employees at DuPont's Niagara Falls facility. (DuPont Mem., p. 9).

DuPont and the Union are parties to a Collective Bargaining Agreement ("CBA") which governs their employment relationship. (Exhibit A to the Complaint, Docket No. 1 ("CBA")). The CBA contains an arbitration provision which states the following:

> Any question as to the interpretation of this Agreement, or as to any alleged violation of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, at the request of either party, shall be submitted to arbitration.

(CBA, Art. X, § 1).

The CBA also contains a section relating to employee benefit plans entitled "Industrial Relations Plans and Practices." (CBA, Art. XI). This section provides that:

> All existing privileges heretofore enjoyed by the employees at the said Plant in accordance with

> the following Industrial Relations Plans and Practices of the COMPANY shall continue subject to such rules and regulations as existed prior to the signing of this Agreement and to such modifications thereof as may be hereafter adopted generally by the COMPANY to govern such privileges, provided, however, that as long as any of these COMPANY Plans and Practices is in effect within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement. Any change in the Industrial Relations Plans and Practices, except for the BeneFlex Flexible Benefits Plan, which has the effect of reducing or terminating benefits will not be made effective until twelve (12) months' notice is give to the UNION by the COMPANY of that change. Changes to the BeneFlex Flexible Benefits Plan, including changes that have the effect of reducing or terminating benefits, may be made to the BeneFlex Flexible Benefits Plan in accordance with the terms and conditions of said Plan.

(CBA, Art. XI, § 1 (emphasis added)). The CBA lists several benefit plans that are provided to Union employees, these are:

> BeneFlex Flexible Benefits Plan
> Career Transition Financial Assistance Plan
> Short-Term Disability Plan
> Pension and Retirement Plan
> Special Benefits Plan
> Vacation Plan
> Service Emblem Plan
> Continuity of Service Plan
> Payment to Employees on State and
> National Guard Emergency Duty
> Payment to Employees on Jury Duty

Savings and Investment Plan
Total and Permanent Disability Income Plan

(CBA, Art. XI, § 1 (emphasis added)).

On August 28, 2006, DuPont Senior Vice President Jim Borel issued an announcement via e-mail, which the Union contends violated the terms of the CBA, and which DuPont contends modified the terms of the individual benefit plans. (Exhibit B to the Complaint, Docket No. 1 ("DuPont Announcement")). The e-mail announced various benefit changes for new and existing employees. For instance, the e-mail stated that:

> For employees hired beginning January 1, 2007, the redesigned SIP plan [Savings and Investment Plan] will be the sole vehicle for their retirement security. They will not be eligible to participate in the Pension and Retirement Plan and they will not receive a company subsidy for retiree healthcare (medical and dental) and retiree life insurance. Their maximum annual vacation benefit will be five weeks and they will be eligible to purchase vacation only during the first ten years of employment with DuPont.

(DuPont Announcement, Docket No. 1 (emphasis added)).

On September 6, 2006, the Union filed a grievance arguing that the announced changes violated the terms of the CBA. (Exhibit C to the Complaint, Docket No. 1, ("Grievance")). The Union specifically claimed (1) that the announced changes were not permissible "modifications" of benefit plans within the meaning of Article XI of the CBA; (2) that the "withdrawal" of these plans for new employees violated Article XI of the CBA; and (3) that DuPont had failed to give the Union 12 months notice of the

reduction and termination in certain benefits as required by the CBA. (Grievance, Docket No. 1).

DuPont responded by letter on January 26, 2007, and stated that it was refusing to submit the Grievance to arbitration. (Exhibit D to the Complaint, Docket No. 1, ("DuPont Letter")). DuPont explained that it viewed the Grievance as a dispute over Union members' eligibility for certain benefits under the terms and conditions of the individual benefit plans, and not a dispute alleging a violation of the CBA. (DuPont Letter, Docket No 1).

B. Procedural History

On March 2, 2007, the Union filed a Complaint seeking to compel arbitration, and alleging that DuPont had breached the CBA. (Docket No. 1). On July 23, 2007, the Union filed a Motion for Judgment on the Pleadings seeking an order compelling arbitration. (Docket No. 27).[1] The Union later moved to amend this Motion, specifically as to the relief requested, and stated that in addition to an order compelling arbitration the Union was seeking declaratory judgment that DuPont had violated the CBA, and an award of attorneys' fees and costs. (Docket No. 34).

On July 23, 2007, DuPont filed a Motion for Summary Judgment seeking dismissal of Plaintiff's Complaint. (Docket No. 28).[2] In support of this

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[1] In support of its Motion for Judgment 1 on the Pleadings, the Union submitted a Memorandum of Law and the Affidavit of Jennifer L. Hunter, Esq. In response, DuPont submitted a Memorandum of Law and supporting exhibits. In reply, the Union submitted a Memorandum of Law and a supporting exhibit.

[2] In support of its Motion for Summary Judgment, DuPont submitted the Affirmation of Jennifer G. Knight, the Affir-

Motion, DuPont filed an Affirmation by Mary Jo Anderson (Docket No. 30), which the Union alleges is inadmissible and has moved to strike. (Docket No. 39).[3]

After briefing on the Parties' cross-motions was complete, the Union filed a Motion for Leave to File Supplemental Authority, asking that this Court consider a recently published decision of the District Court for the Eastern District of Virginia: *E.I. DuPont De Nemours and Co. v. Ampthill Rayon Workers, Inc.*, 516 F.Supp.2d 588, 2007 WL 2812902 (E.D.Va. 2007). (Docket No. 47).[4] The Ampthill Decision reviewed DuPont's 2006 changes to employee benefits, and held that a grievance filed by the Rayon Workers Union challenging these changes should be submitted to arbitration. *Ampthill*, 516 F.Supp.2d 588, 2007 WL 2812902, at *8.

III. DISCUSSION

A. Judgment on the Pleadings Standard

Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). Courts faced with motions under

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mation of Mary Jo Anderson, a Statement of Facts, a Memorandum of Law, and supporting exhibits. In response, the Union submitted a Memorandum of Law and a Statement of Facts. In reply, DuPont submitted a Memorandum of Law.

[3] In support of its Motion to Strike, the Union submitted the Declaration of James Briggs. DuPont submitted a Response in Opposition, and the Union filed a Reply in Support.

[4] In support of its Motion for Leave to File Supplemental Authority, the Union submitted a Memorandum and a supporting exhibit. DuPont filed a Response in Opposition and a supporting exhibit.

Rule 12(c) apply the same standard used to decide motions brought under Rule 12(b). *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). On a Motion for Judgment on the Pleadings, the Court must draw all inferences in favor of the non-moving party. *Id.*

B. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is warranted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law." Id. In a case where the non-moving party bears the ultimate burden of proof at trial, the movant may satisfy its burden by pointing to the absence of evidence supporting an essential element of the non-moving party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923

F.2d 979, 982 (2d Cir. 1991). The function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

C. The Union's Motion for Judgment on the Pleadings

The Union has moved for judgment on the pleadings, requesting in part that this Court compel DuPont to submit their Grievance to arbitration. (Docket No. 27). The Union contends that the Grievance alleges a violation of the CBA; that resolving the Grievance will involve interpretation of the CBA; and that the Grievance is therefore subject to arbitration under Article X of the CBA. (Union's Mem. Supporting Judgment on the Pleadings, Docket No. 27, pp. 3-14). DuPont responds that this is not a dispute involving the CBA, but rather, a dispute over the terms, conditions, eligibility, and interpretation of the individual employee benefit plans provided for in the CBA. (DuPont's Mem. Opposing Judgment on the Pleadings, Docket No. 37, pp. 9-10).

The Supreme Court has long held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed ... to submit." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). "[T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of*

America, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986).

In labor disputes such as this, the United States Supreme Court has recognized a presumption in favor of arbitrability:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder...." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

AT&T, 475 U.S. at 650 (quoting *Warrior & Gulf Nav.*, 363 U.S. at 582-85) (emphasis added).

Like the arbitration provision discussed by the Supreme Court in AT&T, the arbitration provision in the CBA here extends to "[a]ny question as to the *interpretation* of [the CBA]" (CBA, Art. X, § 1 (emphasis added)), and may therefore be characterized as a broad arbitration provision. *AT&T*, 475 U.S. at 650. Accordingly, to overcome the presumption in favor of arbitration, there must be "forceful evidence of a

purpose to exclude the claim from arbitration." *AT&T*, 475 U.S. at 650.

The Union contends that there is a fundamental disagreement between the parties as to whether Article XI of the CBA permits DuPont to unilaterally withdraw certain employee benefit plans. (Union Reply Mem., Docket No. 40, pp. 2-3). DuPont argues that this is not a dispute about the CBA, but rather, a dispute over the terms, conditions, eligibility, and interpretation of the individual employee benefit plans. (DuPont Response Mem., Docket No. 37, pp. 9-10). Here, the Court agrees with the Union that this dispute is a matter subject to arbitration under the CBA.

Article XI of the CBA provides that "[a]ll existing privileges heretofore enjoyed by the employees at the said Plant in accordance with the following Industrial Relations Plans and Practices of [DuPont] shall continue subject to . . . modifications thereof as may be hereafter adopted generally by [DuPont] to govern such privileges." (CBA Article XI, (emphasis added)). Article XI further provides that "as long as any of these [individual benefit plans] is in effect within [DuPont], it *shall not be withdrawn* from the employees covered by this Agreement." (CBA Article XI, (emphasis added)).

The Union contends that the changes outlined in the 2006 Announcement impermissibly *modified* and effectively *withdrew* certain employee benefits provided for in the CBA. (Union's Mem. Supporting Judgment on the Pleadings, Docket No. 27, pp. 3-14). DuPont responds that the 2006 Announcement modified the terms and conditions of the *individual employee benefit plans*, and did not impermissibly modify or withdraw any benefits under the CBA.

(DuPont's Mem. Opposing Judgment on the Pleadings, Docket No. 37, pp. 9-22).

This determination--whether the 2006 Announcement constituted an impermissible modification or withdrawal of benefits--goes directly to the merits of the Union's Grievance, and the question of whether DuPont in fact violated the CBA. Furthermore, the resolution of this question will require an interpretation of the CBA, specifically Article XI and the provisions governing the modification and withdrawal of employee benefits. The CBA states that "[a]ny question as to the *interpretation* of this Agreement, or as to *any alleged violation* of this Agreement . . . *shall be* submitted to arbitration." (CBA, Art. X, § 1 (emphasis added)). Because the Union's Grievance alleges a violation of the CBA, and because resolving this alleged violation will require an interpretation of the CBA, this Court finds that the matter should be submitted to arbitration under Article X of the CBA.

Note that the Court is not determining here whether the 2006 Announcement *did in fact* impermissibly modify or withdraw employee benefits. Such a holding would effectively determine on the merits whether DuPont violated the CBA as the Union has alleged in its Grievance. Litigating the merits of a plaintiff's grievance on a motion to compel arbitration would undermine the arbitration process and negate any benefits to resolving a dispute through arbitration. Rather, the Court is finding that the allegations contained in the Union's Grievance fall within the scope of the CBA arbitration provision, particularly where there is a presumption in favor of arbitration on public policy grounds.

Accordingly, the Union's Motion for Judgment on the Pleadings (Docket No. 27) is granted in part and denied in part. The Union's Motion is granted in part, in that the Court finds that the Grievance should be submitted to arbitration (with the exception of claims relating to the Medcap Plan and the Dental Plan which the Union has withdrawn). (Union Reply Mem., Docket No. 40, p. 2, n. 1). The Union's Motion is denied in part, in that the Court declines to find whether DuPont has breached the CBA, and declines to award costs and attorneys' fees. Lastly, the Union's Motion to Amend (Docket No. 34) is granted, in that the Court has *considered* the Union's revised request for relief.

D. DuPont's Motion for Summary Judgment

DuPont contends in its Motion for Summary Judgment that the claims in the Union's Grievance are not subject to arbitration. (Docket No. 28). For the reasons stated above, DuPont's Motion for Summary Judgement is denied. Because the Union's Grievance alleges a violation of the CBA, and because resolving this alleged violation will require an interpretation of the CBA, this Court finds that the Grievance is subject to arbitration under Article X of the CBA.

E. Remaining Motions

After DuPont moved for Summary Judgment, the Union moved to strike the Affirmation of Mary Jo Anderson in support of DuPont's Motion for Summary Judgment (Docket No. 39). DuPont's Motion for Summary Judgment having been denied, the Union's Motion to Strike is denied as moot.

Additionally, the Union filed a Motion for Leave to File Supplemental Authority, asking that this Court consider a recently published decision of the District

Court for the Eastern District of Virginia: *E.I. DuPont De Nemours and Co. v. Ampthill Rayon Workers, Inc.*, 516 F.Supp.2d 588, 2007 WL 2812902 (E.D.Va. 2007). (Docket No. 47). The Union's Motion is granted, in that the Court has considered--but has not exclusively relied on—the Ampthill Decision.

IV. CONCLUSION

For the foregoing reasons, the Union's Motion for Judgment on the Pleadings is granted in part and denied in part; DuPont's Motion for Summary Judgment is denied; the Union's Motion to Amend is granted; the Union's Motion to Strike is denied as moot; and the Union's Motion for Leave to File Supplemental Authority is granted.

Because the Union's Grievance alleges a violation of the CBA, and because resolving this alleged violation will require an interpretation of the CBA, this Court finds that the Grievance is subject to arbitration under Article X of the CBA.

V. ORDERS

IT HEREBY IS ORDERED, that the Union's Motion for Judgment on the Pleadings (Docket No. 27) is GRANTED in part and DENIED in part, con-sistent with the foregoing Decision and Order.

FURTHER, that DuPont's Motion for Summary Judgment (Docket No. 28) is DENIED.

FURTHER, that the Union's Motion to Amend (Docket No. 34) is GRANTED, in that the Court has *considered* the revised request for relief.

FURTHER, that the Union's Motion to Strike (Docket No. 39) is DENIED as moot.

FURTHER, that the Union's Motion for Leave to File Supplemental Authority (Docket No. 47) is GRANTED, in that the Court has *considered* the supplemental authority.

FURTHER, that the Clerk of the Court is directed to take the steps necessary to close this case.

SO ORDERED.

Dated: March 17, 2008
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge